UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

FREDERICK R. CANTOR,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 00-128-P-C***
	)	
ARTHUR J. O'DEA,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

In this diversity action arising from an agreement by defendant and Massachusetts resident Arthur J. O'Dea to continue the patent-law practice of plaintiff and Maine resident Frederick R. Cantor, O'Dea moves for summary judgment as to three of the five counts asserted against him (Counts I-III), while Cantor seeks summary judgment as to Count I and as to all five counts of O'Dea's counterclaim against him. *See* Defendant's Motion for Summary Judgment ("Defendant's Motion") (Docket No. 9); Defendant's Memorandum of Law in Support of Motion, etc. ("Defendant's Memorandum") (Docket No. 9) at 2; Plaintiff's Motion for Summary Judgment, etc. ("Plaintiff's Motion") (Docket No. 14) at 1; First Amended Complaint ("Complaint") (Docket No. 6) ¶¶ 1-4, 7. [1] For the reasons that follow, I recommend that the Defendant's Motion be granted and that the Plaintiff's Motion be granted in part and denied in part.

[1] O'Dea states that he seeks an order "dismissing the Complaint herein." Defendant's Motion. However, he confines his arguments to Counts I-III. *See generally* Defendant's Memorandum. As of the time O'Dea sought summary judgment, the complaint had been amended to add two counts (Counts IV and V). *See* Plaintiff's Motion for Leave To Amend Complaint, etc. (Docket No. 5) and (*continued on next page*)

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). To the extent that parties cross-move for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720, at 336-37 (1998).

II. Factual Context

endorsement thereto; Complaint.

The following facts that are either admitted, or supported by a record citation in the face of a denial or non-response in accordance with Local Rule 56, are material to the grounds on which I base this recommended decision.[2]

Cantor has been engaged since 1989 in the practice of patent law in Portland, Maine and Newburyport, Massachusetts. Defendant's Statement of Undisputed Material Fact ("Defendant's SMF") (Docket No. 10) ¶ 1; Plaintiff's Opposing Statement of Material Facts ("Plaintiff's Opposing SMF") (Docket No. 17) ¶ 1. In 1997-98 Cantor decided because of his age and diabetes to sell his patent-law practice. *Id*. He advertised it for sale in several law publications. *Id*.

Allison Collard of Collard & Roe, P.C. ("C&R"), a patent law firm in Roslyn, New York, contacted Cantor in mid-1998. *Id*. at ¶ 4. C&R's business strategy included expansion by acquisition. *Id*. On or about August 1, 1998 Cantor entered into an agreement with C&R for the sale of Cantor's patent-law practice. *Id*. at ¶ 5. C&R agreed to pay Cantor $10,000 for the contents of the law office as well as twenty-five percent of all money received for work performed by C&R for Cantor clients during the first three years following the transaction and ten percent for work performed during the fourth year thereafter. Agreement between Frederick R. Cantor, Esq. and Collard & Roe, P.C. ("Collard Agreement"), attached as Exh. 7 to Deposition of Frederick R. Cantor ("Cantor Dep."), filed with Plaintiff's Opposing SMF, ¶¶ 2-3, 6.

On and after August 5, 1998, Collard's son and associate spent about one week in Portland attempting to learn about the practice, the identity of clients and the clients' needs, as well as to meet the clients. Affidavit of Allison C. Collard ("Collard Aff."), attached as Exh. 4 to Defendant's SMF, ¶ 8. Some time after August 8, 1998, virtually all of Cantor's files were moved to Long Island. Cantor Dep. at 57. At the initiative of C&R, introductory letters were sent to nearly all of the clients

[2] Inasmuch as the facts adduced in support of or opposition to the Defendant's Motion are largely coextensive with those adduced in (*continued on next page*)

described as active by Cantor. Collard Aff. ¶ 8. An estimated two dozen letters were sent out. *Id*. C&R followed up and initiated relationships with three or four of the most significant of the Cantor clients. *Id*.[3]

C&R never staffed the Portland office. Cantor Dep. at 58-59. By mid-September 1998 C&R decided that the business opportunity did not justify the investment that C&R would have to make to manage and develop a law practice in Maine and that the only reasonable, economic alternative was to sever the relationship with Cantor.[4] Collard Aff. ¶ 12. After negotiation, Cantor and C&R rescinded the acquisition, with Cantor retaining the $10,000 payment described in paragraph 2 of the Collard Agreement. Defendant's SMF ¶ 9; Plaintiff's Opposing SMF ¶ 9. The rescission was memorialized in a termination agreement dated September 25, 1998 (the "Termination Agreement").[5] *Id*.

As a result of its effort to learn the business, C&R came to the conclusion that Cantor had grossly overstated his client base. Collard Aff. ¶ 9. Collard avers that there were only about seventeen active clients as opposed to the more than fifty described by Cantor, *id*. — a disputed fact inasmuch as Cantor continued to maintain at his deposition that as of March 26, 1999 his practice had more than one hundred and fifty active clients, *see* Cantor Dep. at 130. Collard also states that,

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support of or opposition to the Plaintiff's Motion, for ease of reference I have melded the two into a unified record.

[3] O'Dea cites his own deposition testimony to the effect that certain named Cantor clients defected to C&R or to other law firms following the C&R transaction. Defendant's SMF ¶ 9 (citing Deposition of Arthur J. O'Dea ("O'Dea Dep."), filed with Plaintiff's Opposing SMF, at 103-08, 145). Cantor protests that this is inadmissible hearsay. Plaintiff's Opposing SMF ¶ 9. It is indeed. The testimony, which clearly is offered to prove the truth of the matter asserted, does not appear to fit within any category of hearsay exception. *See* Fed. R. Evid. 801(c), 803-04, 807. It accordingly is disregarded.

[4] Cantor argues that Collard's opinions as to the viability of the Cantor practice should be stricken either as undesignated expert testimony or for lack of foundation in view of the brevity of the Cantor-C&R relationship. Plaintiff's Opposing SMF ¶ 9. I disagree. The Collard opinions qualify as lay opinions pursuant to Fed. R. Evid. 701, grounded in Collard's personal experience with the Cantor practice as described in his affidavit. The length of the relationship goes to the weight, rather than admissibility, of the opinions.

[5] A portion of the record cited by the parties indicates that C&R took eighteen boxes of Cantor's files and returned only six, with C&R explaining the discrepancy on the basis of its removal of duplicates and other unnecessary material. Cantor Dep. at 61. C&R was obligated by the terms of the Termination Agreement to return all of Cantor's files. *See* Termination Agreement, attached as Exh. 7 to Defendant's SMF.

although Cantor's tax returns showed average gross revenues for the practice in prior years of just under $100,000 per year, C&R concluded after amalgamation that there were ongoing revenues of only about $30,000 per year. Collard Aff. ¶ 10. According to Collard, it became obvious that several of the more significant clients had no loyalty to Cantor and had already begun to seek out other law firms to service their patent-law needs. *Id*.

After the execution of the Termination Agreement, Cantor re-offered his practice for sale. Defendant's SMF ¶ 10; Plaintiff's Opposing SMF ¶ 10. On or about March 9, 1999 O'Dea learned of the availability of the practice and contacted Cantor. *Id*. at ¶ 11. Cantor described his law practice to O'Dea as having annual gross revenues of about $100,000, which he achieved by working only two to three days per week, and a client base of more than one hundred and fifty active clients. *Id*. at ¶ 13; O'Dea Dep. at 21-22; Cantor Dep. at 147. Cantor showed O'Dea gross revenues as reported on Schedule C tax forms for 1994, 1995, 1996 and 1997.[6] Plaintiff's Statement of Material Facts in Support of Summary Judgment ("Plaintiff's SMF") (Docket No. 15) ¶ 24; Defendant O'Dea's First Revised Response to Plaintiff's Statement of Material Facts ("Defendant's Opposing SMF") (Docket No. 31) ¶ 24. The Schedule C forms themselves showed revenues, rounded to the nearest thousand, of $104,000, $101,000, $87,000 and $97,000 in each of those years, an average of about $97,500. *Id.* at ¶ 25.[7] In addition, O'Dea was provided with a client list and discussed expenses of the practice. *Id*. at ¶ 28.

O'Dea in March 1999 was in his late thirties, was an experienced professional engineer at Lucent Technologies ("Lucent") making slightly more than $100,000 per year and was licensed as a patent agent to submit patent applications. *Id*. at ¶ 18. He consulted with three advisors before

[6] The reference to "W-2" forms is a typographical error. *See* Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's Reply") (Docket No. 24) at 5 n.2.

agreeing to the deal — his father, who is an attorney; Lou Franco, a law school professor who provided a list of about fifteen questions to ask Cantor; and Mark Casey, a patent attorney. *Id*. at ¶ 19. The parties met at least once prior to executing an agreement. *Id*. at ¶ 21. O'Dea wrote three pages of notes at a meeting with Cantor, typed two pages worth of questions, wrote notes all over a draft agreement and bargained over the terms of the agreement. *Id*. at ¶¶ 20, 22. Some terms of the agreement were in fact changed. *Id*. at ¶ 22.

During March 1999 negotiations, O'Dea (then a part-time law student) told Cantor that he would graduate from law school in May 1999 and would then take the bar examination. Defendant's SMF ¶¶ 16-17; Plaintiff's Opposing SMF ¶¶ 16-17. O'Dea stated that it was his intention to become a patent attorney as soon as he was admitted to the Massachusetts bar and to leave Lucent and go full-time with the law practice once he passed the bar, although he could not leave Lucent until he passed the bar. Cantor Dep. at 88; O'Dea Dep. at 32-33, 138.

On March 26, 1999 O'Dea and Cantor executed and delivered an agreement for the acquisition by O'Dea of the Cantor law practice and related assets (the "O'Dea Agreement"). Defendant's SMF ¶ 19; Plaintiff's Opposing SMF ¶ 19. The agreement provides *inter alia*:

> 1. O'DEA represents that he intends to use HIS best efforts during the term of this Agreement to increase and develop continuing and future relationships with the clients of CANTOR, including expanding the advertising, using a newsletter, and contacting prospective new clients and meeting present and future clients at the Portland and Newburyport Offices.
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> 2. Upon execution of this Agreement, O'DEA shall pay $10,000 to CANTOR for the contents of the patent law office of CANTOR, including, but not limited to, furniture, files, books, office equipment, computers, computer software, supplies, etc.
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> 3. O'DEA agrees to pay 30 percent to CANTOR of all money received for legal services fees performed by O'DEA for present and future clients of CANTOR,

[7] The reference to "W-2" forms is a typographical error. *See* Plaintiff's Reply at 5 n.2.

performed subsequent to the date of this Agreement, for a period of three years from the date of this Agreement.

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8. O'DEA agrees to use his best efforts to assure that all current, pending and future client matters subject to this Agreement are effectively managed and shall make every reasonable effort to assure prompt and timely billing, invoicing and collection of all amounts that are and shall become due and owing by such clients, it being understood that the sums of money to be paid to CANTOR are to be calculated upon the rendering of services, as of the actual date or dates when the work is actually performed, regardless of when request for payment is made or when payment is actually received, even if after the expiration of the time period specified herein.

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12. O'DEA shall pay all the expenses necessary to maintain the CANTOR offices in Portland and Newburyport, including, but not limited to, the rent, telephone, answering service, advertising, utilities, paralegal, as needed, etc., for a period of at least three years.

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14. CANTOR agrees to be available from time to time for initial meetings with previously existing clients, and O'DEA, at either the Portland or Newburyport Offices, for a period of three months from the initial date of the Agreement. Further, CANTOR will consult with O'DEA from time to time.

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16. The parties shall create a letterhead such as "Frederick R. Cantor & Associates" for the CANTOR practice, and notify past, present and prospective clients of the new affiliation. CANTOR can later be listed as "of counsel" on the letterhead as clients, new and old, become accustomed to the affiliation.[8]

O'Dea Agreement, attached as Exh. 22 to Cantor Dep.

[8] A new letterhead was in fact created. Cantor Dep. at 137.

After March 26, 1999 O'Dea took over the Cantor practice. Cantor Dep. at 94.[9] O'Dea returned all calls placed to the office, met clients in the Portland office on an as-needed basis, most recently in January 2000, and met clients in Newburyport. O'Dea Dep. at 49-51. He worked "countless hours," approximately three to five evenings a week and weekends. *Id*. at 153-54. Revenues from the nine months during which O'Dea operated the practice in 1999 were "roughly $30,000." *Id*. at 140.

According to O'Dea, he first learned of the C&R transaction after March 26, 1999, in a telephone call with Cantor and a client. *Id*. at 36-37, 64-65. According to Cantor, he mentioned to O'Dea on two occasions prior to the closing that the practice previously had been sold but that the sale had been terminated because the buyer decided not to maintain a practice in Portland. Cantor Dep. at 95-97.

O'Dea was admitted to the Massachusetts bar in late 1999. Cantor Aff. ¶ 3. In November 1999 O'Dea opened an office in Andover, Massachusetts. O'Dea Dep. at 55. On or about January 1, 2000 O'Dea determined that the Newburyport office was not economical and that it was not needed to maintain the former Cantor law practice, so he terminated the rental arrangement. Defendant's SMF ¶ 25; Plaintiff's Opposing SMF ¶ 25.

Commencing in or about January 2000 O'Dea opened discussions with Cantor about rescinding the O'Dea Agreement. *Id*. at ¶ 28. In February 2000 O'Dea advised Cantor that he had been offered a promotion and an increase in pay at Lucent and could not justify giving up that position

[9] As a patent agent, O'Dea was authorized to represent inventors before the United States Patent and Trademark Office ("USPTO"), including submitting patent applications. O'Dea Dep. at 12-13; Cantor Aff. ¶ 2. If an appeal from a final decision of the USPTO was necessary, an attorney would have to be involved. *Id*. Had the need arisen, Cantor would have reviewed and signed documents for patent-related court appeals. Cantor Aff. ¶ 3. O'Dea never asked for such assistance. *Id*.

to devote full-time to the Cantor law practice. *Id*. O'Dea offered to rescind the transaction, forfeit the investment to date and return the practice to Cantor. *Id*. Cantor declined. *Id*.[10]

In April 2000 O'Dea contacted Peter Borghetti, a patent lawyer in Danvers, Massachusetts, to take over the former Cantor law practice. *Id*. at ¶ 29. O'Dea offered to assign his rights and future obligations under the O'Dea Agreement to Borghetti. *Id*. An agreement in principle was reached for Borghetti to amalgamate the Cantor practice into his practice in Danvers. *Id*. Proposed contracts were drafted. *Id*. O'Dea proposed to Cantor a termination of the O'Dea Agreement and an assignment of the practice to Borghetti. *Id*. Cantor refused. *Id*. Cantor also telephoned Borghetti. *Id*. According to O'Dea, Cantor threatened to sue Borghetti if he became involved in the former Cantor law practice. O'Dea Dep. at 84-87; Affidavit of Peter J. Borghetti ("Borghetti Aff."), attached as Exh. 1 to Defendant's SMF, ¶¶ 5, 7. Cantor denies having threatened suit. Cantor Aff. ¶ 4. Following the conversation with Cantor, Borghetti advised O'Dea that he could not proceed with the proposed assignment. Borghetti Aff. ¶ 8.

Cantor filed the instant action on May 1, 2000. *See* Complaint and Demand for Jury Trial (Docket No. 1) at 1. In June 2000 O'Dea determined that the Portland office was not needed to maintain the Cantor law practice, and sublet the premises. Defendant's SMF ¶ 25; Plaintiff's Opposing SMF ¶ 25. In spring 2000, Cantor dialed both of the telephone numbers for the Portland office, including the toll-free number. Cantor Aff. ¶ 6. In each case, he reached a recorded message indicating that the number was out of service and that no other information was available. *Id*. Cantor dialed the same numbers on September 29, 2000 and heard the same messages. *Id*. ¶ 7.

[10] On April 12, 2000 O'Dea wrote to Cantor, stating that Lucent was "making it very difficult" for him to leave. Internal Memorandum dated April 12, 2000 from AJO to FRC, attached as Exh. 24 to Cantor Dep. When asked at deposition what Lucent was doing that made it difficult for him to leave, O'Dea answered: "Granting me stock options and promotion." O'Dea Dep. at 72.

Since acquiring the Cantor practice, O'Dea has met with fewer than twenty clients in Portland and only approximately ten to fifteen in Newburyport. O'Dea Dep. at 148. As of the date of his deposition (July 21, 2000), O'Dea had never met with clients at his Andover office, which had no staff. *Id*. at 60-61. He did not create a newsletter and took down a practice-related Web site as of May 2000. *Id*. at 45, 48. Beginning in 2000, O'Dea's responsibilities at Lucent have absorbed more of his time, requiring increased weekend work and longer weekdays. *Id*. at 78-81. He is no longer seeking new clients. Plaintiff's SMF ¶ 10; Defendant's Opposing SMF ¶ 10.

From March 26, 1999 through July 31, 2000 O'Dea received total gross revenues from the former Cantor law practice of $42,792.21. Defendant's SMF ¶ 30; Plaintiff's Opposing SMF ¶ 30. He attributes the shortfall in revenue to misrepresentations by Cantor about the level of activity of the practice and to the loss of clients and confusion created by the C&R transaction. *Id*. at ¶ 27.[11] However, at deposition O'Dea testified, "I won't dispute the Schedule C's. . . ." Plaintiff's SMF ¶ 27; Defendant's Opposing SMF ¶ 27. He also wrote to Cantor's attorney in March 2000: "I will not dispute that a Patent Attorney such as Mr. Cantor, with more than 25 years of experience, is capable of the operation of a solo law practice with revenues that you state in your calculations [$100,000 per year]." *Id*. at ¶ 29.

O'Dea has invested personal funds in the business in the amount of $17,970 and continuing. Defendant's SMF ¶ 26; Plaintiff's Opposing SMF ¶ 26. He paid $7,800 to Cantor in 1999 as his share of fees. *Id*. As of September 29, 2000 Cantor had not received any percentage of revenues from O'Dea for the Cantor practice for at least five months. Cantor Aff. ¶ 8. O'Dea has delivered a

[11] Cantor argues that "O'Dea's subjective and after-the-fact opinions as to the economic viability of the Cantor law practice are irrelevant and should be stricken since they purport to present expert testimony although O'Dea designated no expert witnesses." Plaintiff's Opposing SMF ¶ 27. O'Dea's opinion is neither irrelevant nor an expert opinion; rather, it is a lay opinion based on O'Dea's personal experience with the Cantor practice, which is admissible pursuant to Fed. R. Evid. 701. Cantor also disputes the factual correctness of the O'Dea opinions, asserting that the shortfall is attributable to O'Dea's own failings. *Id*..

complete accounting of the law practice revenues and expenses to Cantor. Defendant's SMF ¶ 31; Plaintiff's Opposing SMF ¶ 31.[12]

O'Dea acknowledges that Cantor has no hostility toward him. Plaintiff's SMF ¶ 40; Defendant's Opposing SMF ¶ 40.

III. Discussion

A. Count I of Complaint: Breach of Contract

O'Dea and Cantor cross-move for summary judgment as to Count I of the Complaint, in which Cantor alleges *inter alia* that O'Dea breached the O'Dea Agreement by failing to use his best efforts to increase and develop the Cantor law practice and closing the Portland and Newburyport offices. Complaint ¶¶ 25-27; *see also id*. ¶¶ 16-24. O'Dea interposes four affirmative defenses, one of which is dispositive: that the O'Dea Agreement, pursuant to which Cantor transferred his law practice to a non-lawyer, is unenforceable as against public policy. *See* Defendant's Memorandum at 18-20; Defendant's Reply Memorandum in Support of Motion for Summary Judgment Dismissing All Claims ("Defendant's Reply") (Docket No. 18) at 4-5.

The O'Dea Agreement was in essence an agreement to transfer a patent-law practice to a law student. Although Cantor agreed to make himself available for meetings for the first three months following the closing and to consult from time to time, *see* O'Dea Agreement ¶ 14, effective upon closing O'Dea was to take over and manage the law practice, *see, e.g., id*. ¶¶ 1,3, 8, 12. Further, the parties agreed to "create a letterhead such as 'Frederick R. Cantor & Associates' for the CANTOR practice, and notify past, present and prospective clients of the new affiliation." *Id*. ¶ 16. Following consummation of the transaction in March 1999 — at a time when neither party could have been

[12] Cantor "admits that O'Dea has provided at least a partial accounting of the law practice revenues and expenses. Whether this is complete cannot be determined at this point since O'Dea inconsistently contends that he is developing his own practice . . ., that he has "zero" clients, and that he has opened a small single room in Andover, Massachusetts where he has never met a single client, while he (*continued on next page*)

certain that O'Dea ever would pass the bar or, for that matter, complete law school — O'Dea took over the Cantor practice.

"Under Maine law, persons are guilty of the unauthorized practice of law if they practice law or hold themselves out to practice law while not being admitted to the bar. . . . Moreover, . . . persons who have not been admitted to practice or whose names have been struck from the roll of attorneys are prohibited from advertising or representing themselves to be attorneys or counselors at law." *Board of Overseers of the Bar v. MacKerron*, 581 A.2d 424, 425 (Me. 1990) (citing 4 M.R.S.A. §§ 807 and 859).[13]

Cantor argues that, under the circumstances of this case, there was no illegality inasmuch as (i) O'Dea at the time of the transaction was a registered patent agent, authorized to do all things that a patent attorney would do save for taking an appeal to federal court, (ii) Cantor remained available to O'Dea as a consultant, (iii) O'Dea adduces no evidence that he did anything outside the scope of his patent-agent authorization and (iv) under Maine law, a contract is not voidable on its face simply because it might permit an illegal transaction. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment Dismissing the Complaint ("Plaintiff's SJ Opposition") (Docket No. 16) at 4-6 (citing *Murray v. Town of Lincolnville*, 462 A.2d 40 (Me. 1983)).

These arguments miss the mark. Unlike the contract at issue in *Murray* (concerning the sale of subdivision lots), pursuant to which the parties' performance theoretically could have transgressed Maine law but ultimately did not, *see Murray*, 462 A.2d at 43 n.4, the O'Dea Agreement necessitated transgression of Maine law. O'Dea as a patent agent was authorized to practice before the United

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further professes to be "actively servicing the clients." Plaintiff's Opposing SMF ¶ 31 (citations omitted).

[13] With exceptions not here relevant, 4 M.R.S.A. § 807 provides: "No person may practice law or profess to practice law within the State or before its courts, or demand or receive any remuneration for those services rendered in this State, unless that person has been admitted to the bar of this State . . . or . . . admitted to try cases in the courts of this State[.]" Pursuant to 4 M.R.S.A. § 859, "If any person who has not been admitted to practice law in this State . . . advertises as or represents himself to be an attorney or counselor at (*continued on next page*)

States Patent and Trademark Office and to do all things incident thereto. He was not authorized to take over a legal practice or to hold himself out as an attorney. *See, e.g., Sperry v. Florida*, 373 U.S. 379, 402 & n.47 (1963) ("since patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives. . . . [I]t is entirely reasonable for a [patent] practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license.").

The entire structure of the O'Dea transaction, entailing the takeover of a legal practice by a non-lawyer and its subsequent portrayal to clients as "Frederick R. Cantor and Associates," patently offends the public policy of Maine as codified at 4 M.R.S.A. §§ 807 and 859. An illegal contract is in turn unenforceable. *See, e.g., Bureau of Maine State Police v. Pratt*, 568 A.2d 501, 505 (Me. 1989) (noting "elementary common law rule that courts will not enforce illegal contracts, or contracts which are contrary to public policy, or which are in contravention of the positive legislation of the state") (citation and internal quotation marks omitted).[14] O'Dea accordingly is entitled to summary judgment as to Count I.

B. Count II of Complaint: Negligent Misrepresentation

Cantor alleges in Count II of the Complaint that O'Dea made misrepresentations upon which Cantor relied to his detriment, which Cantor clarifies consisted of the following statements made at the time of formation of the O'Dea Agreement in March 1999: (i) that O'Dea intended to practice as a

law, he shall be guilty of a Class E crime."

[14] Cantor also presses for enforcement of the O'Dea Agreement in part on the ground that the bulk of O'Dea's alleged breaches did not occur until after O'Dea had graduated from law school and passed the bar. *See* Plaintiff's SJ Opposition at 5-6. However, the contract was void when made. *See, e.g., Augusta Trust Co. v. Augusta, Hallowell & Gardiner R.R. Co.*, 134 Me. 314, 326-27 (1936) ("A contract of a corporation, if illegal and void when made because contrary to public policy, is not validated by a subsequent statute authorizing it. This rule is not peculiar to corporate transactions. It applies to all contracts.") (citation omitted).

patent attorney; (ii) that O'Dea's duties at Lucent would not interfere with performance of the contract; and (iii) that O'Dea intended to terminate his employment with Lucent in the very near future. Plaintiff's SJ Opposition at 10 (citing Complaint ¶¶ 12-15, 17, 20, 23, 29).

The Law Court has adopted the formulation of negligent misrepresentation set forth in the Restatement (Second) of Torts:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Chapman v. Rideout, 568 A.2d 829, 830 (Me. 1990) (quoting Restatement (Second) of Torts § 552(1)).

As O'Dea points out, Cantor encounters an insurmountable difficulty in the need to show that the information supplied was false at the time transmitted. *See* Defendant's Memorandum at 16. O'Dea states that at the time of formation of the agreement he did indeed intend to become a patent attorney and did intend to leave Lucent upon passing the bar. He explains that events happening subsequent to formation of the Agreement, including his promotion by Lucent, led him to continue employment with Lucent. Cantor presents no evidence to the contrary concerning O'Dea's intentions at the relevant time. He attempts to overcome this difficulty by arguing that "O'Dea at a minimum was negligent when he assessed his own desires to leave Lucent Technologies, his fortitude in dealing with the competing demands of Lucent Technologies and a law practice, the strength of his desire to build a patent practice, and the strength of his commitment to fulfill his freely chosen contractual obligations." Plaintiff's SJ Opposition at 10. This argument is unavailing. The legal test framed by the Law Court in *Chapman* contemplates that information given is false at the time transmitted and relied upon.

There being no evidence of record that this was so, O'Dea is entitled to summary judgment with respect to this claim.

C. Count III of Complaint: Equitable Accounting

In Count III of the Complaint Cantor seeks an equitable accounting on the basis that O'Dea "owes a fiduciary duty pursuant to the Agreement to remit to the Plaintiff all moneys due and owing under the Agreement and to provide an accurate accounting thereof." Complaint ¶ 35. Even assuming *arguendo* that O'Dea owes Cantor such an accounting duty, Cantor fails to generate a genuine issue of material fact as to whether it has been breached.

O'Dea asserts in his statement of material facts that he "has delivered a complete accounting of the law practice revenues and expenses to Cantor." Defendant's SMF ¶ 31. Cantor admits this with the qualification that "[w]hether this is complete cannot be determined at this point since O'Dea inconsistently contends that he is developing his own practice[.]" Plaintiff's Opposing SMF ¶ 31. Such a rebuttal is insufficient either to controvert the proferred evidence or to withstand summary judgment. *See, e.g., Fajardo Shopping Ctr., S.E. v. Sun Alliance Ins. Co. of Puerto Rico, Inc.*, 167 F.3d 1, 11 (1st Cir. 1999) ("Neither unsupported speculation, nor brash conjecture coupled with earnest hope that something concrete will materialize is sufficient to block summary judgment.") (citations and internal quotation marks omitted). Nor has Cantor moved pursuant to Fed. R. Civ. P. 56(f) for a continuance pending further discovery. *See, e.g., Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 45-46 n.4 (1st Cir. 1999) (discussing showing necessary under Fed. R. Civ. P. 56(f) to warrant such a continuance). Accordingly, O'Dea is entitled to summary judgment as to this count.

D. Counts I and II of Counterclaim: Fraud and Negligent Misrepresentation

In Count I of his counterclaim O'Dea alleges fraud, and in Count II negligent misrepresentation, predicated upon Cantor's alleged omissions and misrepresentations of material fact. Answer to Complaint, Affirmative Defendants [sic] and Counterclaim (Docket No. 2), Counterclaim ("Counterclaim") ¶¶ 1-20.[15] For purposes of summary judgment, Cantor breaks these claims into two groups: (i) those asserting non-disclosure (of business practices, the C&R transaction and portions of the Schedule C forms) and (ii) those asserting misrepresentation (of revenues, client base and profitability). Plaintiff's Motion at 7-8. O'Dea does not contest this categorization. *See* Defendant's Objection to Cantor's Motion for Summary Judgment ("Defendant's SJ Opposition") (Docket No. 19) at 14-17.

Cantor argues that summary judgment is warranted with respect to the "non-disclosure group" inasmuch as (i) under Maine law, non-disclosure is not actionable absent a confidential relationship, and (ii) no such relationship existed between Cantor and O'Dea. Plaintiff's Motion at 8-11. I agree.

"A confidential relationship arises when one party actually places trust and confidence in another party and there exists a great disparity of position and influence between the parties." *Francis v. Stinson*, No. Han-99-187, slip op. at 19 n.8 (Me. Oct. 17, 2000) (citations and internal quotation marks omitted). O'Dea contends that such a confidential relationship did exist between himself (a "rookie") and Cantor, an experienced practitioner. Defendant's SJ Opposition at 16-17. However, the record reveals arm's-length negotiation, with O'Dea consulting three people (all attorneys and one a law-school professor) in the process of negotiating with Cantor and requesting and obtaining certain modifications to the contract proposed by Cantor. Further, although O'Dea was a law student and

[15] In his amended answer filed in response to Cantor's amended complaint, O'Dea incorporated by reference the counterclaim portion of his original answer. *See* Answer and Affirmative Defenses to First Amended Complaint (Docket No. 7) at 7.

Cantor an experienced practitioner, O'Dea was a highly educated professional in his late thirties at the time of negotiations.

Turning to the "misrepresentation group" of claims, I find that genuine issues of material fact preclude summary judgment in Cantor's favor under either the fraudulent- or negligent-misrepresentation theory.

A claim of fraudulent misrepresentation entails a showing:

> (1) that [a party] made a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing [another] to act in reliance upon it, and (5) [the other] justifiably relied upon the representation as true and acted upon it to [its] damage.

Mariello v. Giguere, 667 A.2d 588, 590 (Me. 1995) (citation and internal quotation marks omitted). Each element must be proven by clear and convincing evidence — *i.e.*, "that the factfinder could reasonably have been persuaded that the required findings were proved to be highly probable." *Id*. (citation and internal quotation marks omitted). Reliance is considered to be unjustified only "if the plaintiff knows the representation is false or its falsity is obvious to [it]." *Stinson*, slip op. at 16 (citation and internal quotation marks omitted).

Under a theory of negligent misrepresentation, an actor is liable for pecuniary loss caused by another's justifiable reliance upon (i) false information communicated by the actor for the guidance of the other in business transactions, (ii) in the course of the actor's business, profession, employment or any other transaction in which the actor has a pecuniary interest, (iii) if the actor failed to exercise reasonable care or competence in obtaining or communicating the information. *Chapman*, 568 A.2d at 830.

Cantor contends that O'Dea falls short of proving liability under either theory on two bases: (i) that there was no falsehood, Cantor having accurately conveyed to O'Dea that his practice typically generated about $100,000 annually in revenues, and (ii) that any alleged promises made by Cantor

concerning future performance are not actionable as a matter of law. Plaintiff's Motion at 11-14; Plaintiff's Reply at 5. O'Dea rejoins, and I agree, that there are triable issues whether Cantor represented to O'Dea that his practice as of March 1999 generated revenues of $100,000 and whether those representations were in fact false. *See* Defendant's SJ Opposition at 14-16.

Despite both the conceded accuracy of the Schedule C statements themselves and O'Dea's acknowledgement that an experienced practitioner such as Cantor was capable of generating such a level of revenues, a trier of fact (viewing the record in the light most hospitable to O'Dea and drawing all reasonable inferences in his favor) could find the following highly probable:

1. That, per O'Dea's deposition testimony, Cantor represented that as of March 1999 the practice was capable of generating $100,000 annually in revenues with two to three days' work and had one hundred and fifty active clients. This was neither strictly a representation concerning past performance (per the 1994-97 Schedule C forms) nor a prediction of future performance. Rather, while based in part on historic performance, it was a representation of the state of the practice as of the time of negotiations in March 1999.

2. That the representation was false when made. Per Collard's affidavit, both the client-base and revenue-generating capacity of the Cantor practice were grossly exaggerated even as of the time of the aborted C&R transaction in August-September 1998. C&R then initiated relationships with three or four of the most significant Cantor clients. Although — as Cantor points out, *see* Plaintiff's Opposing SMF ¶ 9 — Collard does not state that C&R maintained these relationships, one still could draw a fair inference that the initiation of these relationships further eroded the Cantor practice base prior to March 1999.

Summary judgment accordingly is warranted in Cantor's favor as to the "non-disclosure group" of claims, but not as to the "misrepresentation group," set forth in Counts I and II of O'Dea's counterclaim.

E. Count III of Counterclaim: Unjust Enrichment

O'Dea asserts in Count III of his counterclaim that Cantor is liable on a theory of unjustment enrichment for the return of more than $100,000, consisting of monies paid by O'Dea to Cantor, monies expended by O'Dea to run the unprofitable Cantor law practice and the value of time invested by O'Dea in that practice. Counterclaim ¶¶ 21-30.[16]

"[A] constructive trust may be imposed to do equity and to prevent unjust enrichment when title to property is acquired by fraud, duress, or undue influence, or is acquired or retained in violation of a fiduciary duty." *Baizley v. Baizley*, 734 A.2d 1117, 1118 (Me. 1999) (citations and internal quotation marks omitted). "A constructive trust is appropriate where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Id*. (citations and internal quotation marks omitted).

Cantor seeks summary judgment as to this claim *inter alia* on the basis that O'Dea relies on the existence of a fiduciary duty and that no such duty existed in this case. Plaintiff's Motion at 15; Plaintiff's Reply at 3. I agree. O'Dea does indeed ground his opposition to summary judgment as to this claim on an asserted fiduciary duty running from Cantor to O'Dea. *See* Defendant's SJ Opposition at 16-17. For purposes of a claim of unjust enrichment, a "fiduciary" relationship is shown on the same facts as is a "confidential" relationship — "the actual placing of trust and confidence in fact by one party in another and a great disparity of position and influence between the parties to the relation."

[16] In opposing summary judgment O'Dea narrows the scope of damages sought on his unjust-enrichment theory to the $17,800 he has actually paid out to Cantor. Defendant's SJ Opposition at 17.

Estate of Campbell, 704 A.2d 329, 331 (Me. 1997) (citation and internal quotation marks omitted). As noted above, the record does not support a finding that such a relationship existed in this case.

Summary judgment accordingly should enter in favor of Cantor as to Count III of O'Dea's counterclaim.

F. Count IV of Counterclaim: Wrongful Interference

In Count IV of his counterclaim, O'Dea seeks damages based on Cantor's alleged interference in O'Dea's attempt to form an association with Borghetti for the continuation of Cantor's law practice. Counterclaim ¶¶ 31-36. Cantor presses for summary judgment as to this claim on the bases that (i) the record demonstrates that O'Dea intended to transfer his obligations under the O'Dea Agreement to Borghetti — not to form a practice with Borghetti — and that (ii) as a matter of law, a party cannot be held liable for tortious interference with its own contract. Plaintiff's Motion at 16-18; Plaintiff's Reply at 3-4. I agree.

O'Dea does not dispute the legal proposition that a party cannot be held liable for tortious interference with its own contract. *See* Defendant's SJ Opposition at 17. The proposition, although apparently not addressed to date by the Law Court, does indeed appear to be well-settled. *See, e.g., Morgan Stanley & Co. v. Texas Oil Co.*, 958 S.W.2d 178, 179 (Tex. 1997) ("for reasons of logic and law, a person must be a stranger to a contract to tortiously interfere with it"); *Douglas Theater Corp. v. Chicago Title & Trust Co.*, 681 N.E.2d 564, 567 (Ill. App. Ct. 1997) ("It is settled law that a party cannot tortiously interfere with his own contract; the tortfeasor must be a third party to the contractual relationship.").[17]

[17] As a corollary to that rule, a landlord has been held to possess a privilege to interfere with the assignment of a tenant's lease. *See, e.g., Geolar, Inc. v. Gilbert/Commonwealth Inc. of Michigan*, 874 P.2d 937, 940 (Alaska 1994) (test for existence of privilege is whether interfering party has direct financial interest in contract and whether that interest motivated conduct in issue).

O'Dea instead insists that Cantor interfered in a business relationship between himself and Borghetti. *See* Defendant's SJ Opposition at 17. Nonetheless, one cannot but conclude from an examination of the evidence of record that the only contemplated business transaction between O'Dea and Borghetti at the time of Cantor's alleged threatening phone call was an assignment of O'Dea's obligations and rights under the Agreement to Borghetti. As a matter of law, Cantor cannot be held liable for tortious interference inasmuch as (i) he was and would have remained a party to the agreement with which he is charged with interfering, and (ii) there is no evidence of any motivation for his alleged conduct apart from desire to protect his economic interests.

Summary judgment accordingly should enter in Cantor's favor as to Count IV of O'Dea's counterclaim.

G. Count V of Counterclaim: Punitive Damages

Cantor finally seeks summary judgment as to Count V of O'Dea's counterclaim, in which O'Dea seeks punitive damages. Plaintiff's Motion at 18-20; Counterclaim ¶¶ 37-40.

Under Maine law, "[p]unitive damages are available if the plaintiff can establish by clear and convincing evidence that the defendant's conduct was motivated by actual ill will or was so outrageous that malice is implied." *Palleschi v. Palleschi*, 704 A.2d 383, 385-86 (Me. 1998). Cantor contends *inter alia* that the record in this case cannot support such a finding. Plaintiff's Motion at 18-20. I agree. First, there is no evidence that Cantor was motivated by "actual ill will." To the contrary, O'Dea testified at deposition that he did not believe that Cantor was motivated by any malice toward him. Nor was Cantor's conduct so outrageous that such malice could be implied. A trier of fact could find, at most, on this record that Cantor was reckless with regard to the truth or falsity of certain representations made at or prior to the transaction in issue. "[M]alice may not be established

by the defendant's mere reckless indifference to the rights of others." *DiPietro v. Boynton*, 628 A.2d 1019, 1024 (Me. 1993) (citations and internal quotation marks omitted).

Cantor accordingly is entitled to summary judgment as to O'Dea's counterclaim for punitive damages.

IV. Conclusion

For the foregoing reasons, I recommend that the Defendant's Motion be **GRANTED** and that the Plaintiff's Motion be **GRANTED** as to Counts III-V of the Counterclaim and those portions of Counts I-II of the Counterclaim based on alleged non-disclosure, and otherwise **DENIED**. If this recommendation is accepted, the following claims and counterclaims will remain for trial: Counts IV and V of the Complaint and those portions of Counts I and II of the Counterclaim predicated on alleged misrepresentation.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 21st day of November, 2000.

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David M. Cohen
United States Magistrate Judge

TRLIST STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-128

CANTOR v. O'DEA Filed: 05/01/00
Assigned to: JUDGE GENE CARTER Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 190
Lead Docket: None Jurisdiction: Diversity
Dkt# in other court: None

Cause: 28:1332 Diversity-Breach of Contract

FREDERICK R CANTOR
plaintiff

JAMES C. HUNT, ESQ.
772-6565
[COR LD NTC]
ROBINSON, KRIGER, MCCALLUM &
GREENE, P.A.
12 PORTLAND PIER
P. O. BOX 568
PORTLAND, ME 04112-0568
772-6565

v.

ARTHUR J O'DEA
defendant

RALPH A. DYER, ESQ.
[COR LD NTC]
477 CONGRESS ST.
SUITE 1010
PORTLAND, ME 04101
773-6489

==========

ARTHUR J O'DEA
counter-claimant

RALPH A. DYER, ESQ.
[COR LD NTC]
477 CONGRESS ST.
SUITE 1010
PORTLAND, ME 04101
773-6489

v.

FREDERICK R CANTOR
counter-defendant

JAMES C. HUNT, ESQ.
772-6565
[COR LD NTC]

ROBINSON, KRIGER, MCCALLUM &
GREENE, P.A.
12 PORTLAND PIER
P. O. BOX 568
PORTLAND, ME 04112-0568
772-6565